

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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ST. PAUL FIRE AND
CASUALTY COMPANY,

Plaintiff,

-against-

CUSTOM FLOORS R US, INC.,

Defendant.

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ORDER ADOPTING REPORT &
RECOMMENDATION
05-CV-1297 (JS)(ETB)

Appearances:

For Plaintiffs: Robert C. Sheps, Esq.
Sheps Law Group, P.C.
35 Pinelawn Road
Suite 106 East
Melville, NY 11747

For Defendant: Helayne Donna Heller, Esq.
Epstein, Grammatico, Frankini & Marotta
1393 Veterans Memorial Highway
Suite 414
Hauppauge, NY 11788

SEYBERT, District Judge:

On March 10, 2005, Plaintiff commenced the instant action alleging claims for negligence and breach of contract. On April 6, 2005, this action was referred to United States Magistrate Judge E. Thomas Boyle "for purposes of scheduling discovery, resolution of discovery disputes, settlement conferences and any other purposes set forth at 28 U.S.C. [S]ection 636(b)(1)(A)." An initial conference in this action was set for June 29, 2005.

On June 28, 2005, the eve of the initial conference, Defendant, by letter, notified the Magistrate Judge of its intention to move to dismiss the instant action for lack of subject

matter jurisdiction. The basis of the proposed motion was that, according to Defendant, there was no diversity of citizenship because the instant action was brought against New York residents on behalf of Plaintiff's insureds, who were also New York residents.

While Defendant's original motion to dismiss for lack of subject matter jurisdiction would have been more properly filed with this Court,¹ and then could have been referred for a Report and Recommendation to Magistrate Judge Boyle pursuant to Federal Rule of Civil Procedure 72(b) and 28 U.S.C. § 636(b)(1)(B), it is apparent that the Parties have waived any objection to Magistrate Judge Boyle filing a Report and Recommendation concerning the disposition of the instant motion.

On September 9, 2005, Magistrate Judge Boyle filed a Report and Recommendation denying Defendant's motion to dismiss for lack of subject matter jurisdiction. The Report and Recommendation provided that any objections were to be filed within ten (10) days of receipt of the Report and that "failure to file objections . . .

¹ The motion was not specifically styled under any Federal Rule. Because Defendant filed a responsive pleading before interposing the instant motion, the Court cannot construe it as a motion pursuant to Rule 12(b)(1). See Charles Wright & Arthur Miller, Federal Practice and Procedure § 1350 (2005) ("If the defense of lack of subject matter jurisdiction is advanced by a motion under Rule 12(b)(1), it must be made prior to service of the responsive pleading.") Instead, the Court construes the instant motion as a motion for judgment on the pleadings pursuant to Rule 12(c). See Ryan v. Volpone Stamp Co., Inc., 107 F. Supp. 2d 369, 375 n.2 (S.D.N.Y. 2000).

will preclude further appellate review of the District Court's order." The Eastern District of New York's Electronic Case Filing ("ECF") System indicates that notice was served upon all Parties on or about September 9, 2005. The time for filing objections to the Magistrate Judge's Report and Recommendation has long since expired and no party has objected to Magistrate Judge Boyle's ruling denying Defendant's motion to dismiss. In addition, the Court has reviewed the Magistrate Judge's Report and Recommendation and finds it to constitute a proper application of prevailing law. See St. Paul Fire and Marine Ins. Co. v. Universal Builders Supply, 409 F.3d 73 (2d Cir. 2005). Accordingly, the Court hereby ADOPTS the Report and Recommendation in its entirety.

SO ORDERED

JOANNA SEYBERT
Joanna Seybert, U.S.D.J.

Dated: Central Islip, New York
December 2, 2005